Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
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Re: Grievance Complaint Regarding Attorney Tess Leopold, State Bar No. 2050151

To the Grievance Committee,

William Lopez was wrongfully convicted and served over 23 years in prison before a U.S. District Court vacated his conviction and ordered the indictment against him be dismissed with prejudice.[1] Lopez, who was 30 years old when he was incarcerated on these charges, was released from prison at the age of 53, and died less than 2 years later.[2]

The federal court found that Tess Leopold[3] was an "overzealous and deceitful trial prosecutor," whose misconduct contributed to Lopez's prolonged, wrongful incarceration.[4] The District Court concluded that Leopold made a false representation to the trial judge about whether the key prosecution witness was aware of an offer of a time-served sentence in exchange for testimony at Lopez's trial.[5] Leopold's false representation led the District Court to question the veracity of Leopold's other assertions.[6]

The District Court's opinion also raises serious concerns about Leopold's decision to prosecute Lopez. "Any discussion of Lopez's case must begin with the weakness of the evidence the prosecution presented at trial,"[7] the District Court wrote, and later concluded, "[t]his case was a

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[1] Exhibit A, *Lopez v Miller*, 915 F Supp 2d 373 (ED NY 2013), available at https://tinyurl.com/47mbf3py.

[2] *See* Exhibit B, NY St Cts Elec Filing (NYSCEF) Doc No. 1, complaint and accompanying exhibits, in *Lopez v The State of New York*, Ct Cl, Bronx County, claim No. 125150 (Oct. 22, 2014) (stating Lopez's date of birth, date of death, and date of release from prison).

[3] Tess Leopold, State Bar No. 2050151, Catalina U.S. Insurance Services, 5 Batterson Park Rd FL 3, Farmington, CT 06032-2561. Phone: (860) 773-3419. Email: tessleopold@gmail.com. These writers do not have personal knowledge of any of the facts or circumstances of Leopold or the cases mentioned; this grievance is based entirely on the court opinions, briefs, and other documents cited herein.

[4] *Lopez*, 915 F Supp 2d at 431.

[5] *Id.* at 386-87. The District Court's decision, as well as other documents related to Leopold's misconduct, refer to Tess Leopold as Tess Allen. It appears that Leopold took the surname Allen after her marriage, but has since reverted to her original surname. *See* The New York Times Archives, *Miss Leopold Becomes Bride Of Gerald Allen*, NY Times (May 6, 1990) ("Tess Leopold and Gerald Allen were married . . . Mrs. Allen, 29 years old, and Mr. Allen, 31, are assistant district attorneys in Brooklyn."), https://tinyurl.com/rt8av6af.

[6] *Id.* at 407 ("[A]lthough A.D.A. Allen represented that [the agreement to testify was revoked], the court questions the veracity of this representation in light of A.D.A. Allen's original false statement." (citation omitted)).

[7] *Id.* at 381.

toss-up at best."[8] Leopold's false representation and decision to prosecute a "toss-up" case resulted in Lopez's wrongful conviction and imprisonment for over 23 years.

Leopold's actions constituted multiple violations of the Code of Professional Responsibility, the law that regulated the legal profession's conduct back in 1990, when the trial took place. Shockingly, as of this writing, 9 years have passed since the District Court found that Leopold was "overzealous and deceitful," but the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Leopold.[9]

1. The Grievance Committee has a Unique Duty to Protect the Public by Holding Prosecutors Accountable for Misconduct.

A. Prosecutorial Misconduct is Pervasive and Unchecked.

Our legal system holds prosecutors to the highest standards of all attorneys.[10] When any attorney errs, it can cause harm, typically to an individual person. But a prosecutor's misconduct can not only destroy a person's life, and that of their family, but also derail the legal system's promises of fairness and equality for all. When state actors harness the punitive power of the state in a manner that violates the state's own rules, it sends the message that power—not justice—is the driving force behind legal actions. A single prosecutor's misconduct can damage "the reputation and public confidence placed" in all prosecutors and the justice system itself.[11]

As the United States Supreme Court and the New York Court of Appeals have stated, a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. *It is as much* his duty to refrain from improper methods calculated to produce a wrongful conviction *as it is* to use every legitimate means to bring about a just one."[12] Hal Lieberman, former Chief Counsel for the Departmental Disciplinary Committee in New York's First Department, has noted how unchecked prosecutorial misconduct "undermines the integrity of the entire system."[13]

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 study of ten years of state and federal decisions revealed more than two

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[8] *Id.* at 412.

[9] *See* New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by attorney Tess Leopold, click on Name hyperlink].

[10] *Matter of Rain*, 162 AD3d 1458, 1462 (3d Dept 2018) ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice."); *see also* ABA Criminal Justice Standards: Prosecution Function Standard 3-1.4(a) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.").

[11] *Rain*, 162 AD3d at 1462.

[12] *Berger v United States,* 295 US 78, 88 (1935) (emphasis added); *see also People v Jones*, 44 NY2d 76, 80 (1978) (quoting *Berger*, 295 US at 88); *People v Calabria*, 94 NY2d 519, 523 (2000) ("Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility—determining facts relevant to guilt or innocence."); *People v Levan*, 295 NY 26, 36 (1945).

[13] Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody,* ProPublica (Apr. 3, 2013), https://tinyurl.com/t2ryucec.

dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[14] Yet these appellate courts "did not routinely refer prosecutors for investigation by the state disciplinary committees," and the disciplinary committees otherwise "almost never took serious action against prosecutors."[15] Indeed, among these numerous cases in which judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee.[16] None of the other implicated prosecutors were disbarred, suspended, or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.[17] As the *New York Times* Editorial Board wrote in 2018, "there's no reliable system for holding prosecutors accountable for their misconduct, and they certainly can't be entrusted with policing themselves."[18]

B. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury and multiple prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly present perjured testimony.[19] If a prosecutor knows that a witness intends to lie on the stand, she must encourage the witness not to do so or else refuse to call the witness to testify. If a prosecutor later learns that a witness fabricated testimony, she is required to take remedial steps.[20] Because they are representatives of the state, not lawyers for an individual, prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[21]

C. The Grievance Committee, as the Only Body Entrusted with Checking Prosecutorial Misconduct, has an Important Duty to Hold Prosecutors Accountable.

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil

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[14] *Id.*

[15] *Id.*

[16] *Id.*; *see also In re Stuart*, 22 AD3d 131, 133 (2d Dept 2005) (holding, following a Grievance Committee disciplinary proceeding, that a prosecutor's misconduct warranted a three-year suspension from the practice of law).

[17] *See* Sapien & Hernandez.

[18] Editorial Board, *Prosecutors Need a Watchdog*, NY Times (Aug. 14, 2018), https://tinyurl.com/4ntvsv85.

[19] *See, e.g.*, *Giglio v United States*, 405 US 150, 153-154 (1972); *Miller v Pate*, 386 US 1, 7 (1967).

[20] *See People v Waters*, 35 Misc 3d 855, 861 (Sup Ct, Bronx Cty 2012) (violation of due process when prosecutor "although not soliciting false evidence, allows it to go uncorrected when it appears" (quoting *Napue v. Illinois*, 360 US 264, 269 (1959)); *see also Napue*, 360 US at 271 (finding a due process violation when prosecutor failed to correct witness's false testimony that he had not received any promise in return for his testimony)).

[21] *See, e.g.*, Daniel S. Medwed, Prosecution Complex: America's Race to Convict and its Impact on the Innocent, 80-81 (2012); *Connick v Thompson*, 563 US 51, 65-66 (2011); *see also* Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 Geo J Legal Ethics 309, 316 (2001) ("The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.")

accountability.[22] In 1976, the U.S. Supreme Court partly justified absolute immunity for prosecutors because it believed that prosecutorial misconduct would be regulated by the "checks" of "professional discipline" by state bar organizations.[23]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[24] A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly disciplined.[25]

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously."[26] Indeed, "neither judges nor defense lawyers ordinarily alerted disciplinary agencies when prosecutors acted wrongly . . . . [D]isciplinary agencies and the courts overseeing them largely gave prosecutors a pass, perhaps hoping that prosecutors' offices would clean up their own messes."[27] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[28] "Prosecutors engage in misconduct because they know they can get away with it."[29]

In 2018, the Appellate Division suspended New York prosecutor Mary Rain's law license for two years for a variety of misconduct, including summation misconduct.[30] In December 2020, the

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[22] *See, e.g.*, *Imbler v Pachtman*, 424 US 409, 427 (1976); *Shmueli v City of New York*, 424 F3d 231, 237 (2d Cir 2005) (noting that prosecutors have "absolute immunity" for the "conduct of a prosecution"); *Dann v Auburn Police Dept*, 138 AD3d 1468, 1469 (4th Dept 2016) ("The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process." (internal quotation marks omitted)); *see also Ryan v. State*, 56 NY2d 561, 562 (1982) (holding that "the doctrine of prosecutorial immunity" precludes "recovery against the State" for "acts of prosecutorial misconduct").

[23] *Imbler,* 424 US at 429; *see also Matter of Malone*, 105 AD2d 455, 459 (3d Dept 1984) (rejecting public official's claim to prosecutorial immunity in a professional ethics proceeding).

[24] *See* Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz L Rev 219, 242–243 (2012).

[25] Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* at 8 (Dec. 2013) https://tinyurl.com/rpxyadhb; *see also* Project On Government Oversight, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 2014), https://tinyurl.com/vjkfr2eh; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L J 59, 81 (2012) (citing "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 NC L Rev 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[26] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L Rev 51, 65 (2017).

[27] *Id.* at 65 (citation omitted); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 NC L Rev 693, 697 (1987).

[28] Sapien & Hernandez.

[29] *Id.*

[30] *Rain*, 162 AD3d at 1462.

Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[31] But even a short suspension like that received by Rain and Kurtzrock[32]—indeed, public discipline of any kind—remains rare.

Prosecutors, the public officials tasked with holding the public accountable, are not being held accountable for their own misconduct. Absent strong, public discipline, misconduct like that of Leopold will continue unabated and undeterred.

2. The District Court Found that Leopold Committed Misconduct in *People v. Lopez*; Lopez Served 23 Years In Prison Following the Wrongful Conviction.

To better understand how Leopold's misconduct—her false representation to the trial court and her potentially "overzealous" prosecution on weak evidence—contributed to a wrongful conviction, it is important to clarify why the District Court would ultimately describe the case against Lopez as "rotten from day one."[33]

Lopez was charged with the shooting and murder of a drug dealer during a robbery.[34] However, there was only "flimsy" evidence that Mr. Lopez committed these crimes.[35] The police had not recovered the firearm or any forensic evidence connecting Mr. Lopez to the crime.[36] Because of this lack of physical evidence, Leopold relied on the testimony of two eyewitnesses. The first eyewitness, Flores, testified to a description of the shooter that did not match Lopez.[37] Moreover, during a hearing, Flores did not identify Lopez as the shooter.[38] Indeed, the trial judge recognized that it was "not possible" that Lopez "could have committed the crime based upon" Flores's description of the shooter.[39]

Without physical evidence and an eyewitness who raised doubts about Lopez's guilt, Leopold seems to have based her case on Chapman, the second eyewitness. Chapman lived in one of the rooms of the crack house where the murder took place.[40] Chapman had not slept for two days and had smoked ten to twelve vials of crack in the two hours before the shooting.[41] Several weeks after

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[31] *In the Matter of Glenn Kurtzrock*, 192 AD3d 197 (2d Dept 2020).

[32] In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court's sanction was surprisingly light. *See, e.g.*, Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State*, HuffPost (Sept. 20, 2017), https://tinyurl.com/yhvmd43k; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (Oct. 1, 2016), https://tinyurl.com/fp9yfs8x; Nina Morrison, *What Happens When Prosecutors Break the Law?*, NY Times (June 18, 2018), https://tinyurl.com/52ar9tjx.

[33] *Lopez* , 915 F. Supp. 2d at 381.

[34] *Id.*

[35] *Id.* at 382.

[36] *Id.* at 381.

[37] *Id.* at 384-85.

[38] *Id.*

[39] *Id.* at 385.

[40] *Id.* at 382, 385.

[41] *Id.* at 386.

the murder, the police arrested Chapman for an unrelated crime, at which point she made an audio-taped statement to the police.[42] There she claimed that she had seen Lopez with a gun at the crack house; that she went back into her room; and that she then heard a shot and a body fall.[43] She then identified Lopez in a lineup.[44]

For five months before Lopez's trial, Chapman was incarcerated at Rikers Island for drug sale charges and a violation of probation.[45] During that period, Leopold offered Chapman a sentence of time served on her probation violation if she testified against Lopez consistently with her audio-recorded statement.[46] Whether that arrangement was still on the table during the trial itself is unclear—and will be discussed in more detail below. At trial, Chapman testified that she had seen Lopez *kill* the victim and look through his pockets[47]—a version of the events that was inconsistent with her prior statement to the police, but more favorable to Leopold's prosecution.

After the verdict but before sentencing, Leopold turned over a letter to Lopez's counsel from Cafield, an inmate with Chapman at Rikers.[48] Cafield wrote that Chapman is "ostensibly on a probation violation but that in actual fact the D.A. had her picked up to make sure she'd be available to testify against this guy she says she saw kill another guy."[49] Cafield's letter detailed how Chapman—along with another woman incarcerated with them who was also present for the murder—discussed how a different man, not Lopez, had committed the murder.[50] Leopold wrote, in her letter disclosing Cafield's letter, that upon investigating these claims Chapman's court testimony "should not be upset."[51]

Following his sentence, Lopez appealed his conviction, but the Kings County Supreme Court, Appellate Division, and Court of Appeals denied him relief.[52] Only 23 years after he was first incarcerated for these charges was Lopez's appeal successful.

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 386-87, 407 ("it is undisputed that at some point, the prosecution offered Chapman a bargain whereby she would receive a sentence of time served on her VOP charge if she testified against Lopez consistently with the audiotaped statements she had made at the police station.").

[47] *Id.* at 386

[48] *Id.* at 389-90.

[49] *Id.*

[50] *Id.* at 390.

[51] *Id.*

[52] *See People v Lopez*, 197 AD2d 594 (2d Dept 1993); *Lopez*, 915 F Supp 2d at 393.

A. The District Court Found That Leopold Committed Misconduct by Making a False Representation to the Court.

The District Court noted that Leopold made at least one false representation to the trial court. During jury selection for Lopez's trial, Leopold "volunteered that she did not 'have any understanding of any promises or agreements or deals' with Chapman."[53] After Leopold made this representation to the court, Lopez's attorney referenced "contrary information" that he had learned from Leopold herself.[54] At that point, Leopold admitted that an offer was discussed five days earlier, in Chapman's probation violation hearing.[55] Per this offer, Chapman would testify in trial consistent with her police statement and in return would receive a sentence of time served on her probation violation.[56] Leopold added that the offer "was never actually discussed with Chapman and that Chapman was not aware of it."[57]

In reviewing the case, the District Court ultimately found that this last "representation was false."[58] The District Court cited to the transcript of the probation violation hearing, which showed that Leopold extended an offer "in open court in Chapman's presence."[59]

The District Court did not explicitly state that any of Leopold's *other* representations were false. However, it raised serious concerns that at least one other was false. After Leopold falsely represented that Chapman was not aware of any offer, Lopez's attorney told the court that it had been discussed in Chapman's presence.[60] At that point, Leopold "shifted her position" and represented that she had previously rescinded the offer.[61]

Leopold did not convince the District Court that she had rescinded the offer before Chapman's testimony. The District Court explained that the transcripts from Chapman's probation appearances only "suggest[ed]" that the offer was "eventually withdrawn."[62] However, the District Court, quoting the trial judge, noted that there was "'no indication'" in the final appearance transcript "whether the offer was withdrawn 'prior to or subsequent to [Chapman's] testimony at [Lopez]'s trial.'"[63] The District Court continued to express its skepticism of Leopold's truthfulness, noting that it was "inexplicabl[e]" for Leopold to withdraw the offer before

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[53] *Id.* at 387.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 387-88.

[63] *Id.* at 388 (citation omitted).

Chapman's testimony at trial,[64] and questioned "the veracity" of Leopold's representation "in light of [her] original false statement."[65] Leopold was "deceitful," the District Court concluded.[66]

B. The Grievance Committee Should Investigate Whether Leopold Committed Misconduct by Pursuing Charges Against Lopez Based on Insufficient Evidence.

In its 426 Years Report, the Kings County District Attorney's Office analyzed 25 wrongful convictions. One of the causes of wrongful convictions the report identified was "the decision to prosecute."[67] The Report explained:

> Among the most important decisions a prosecutor makes is the decision to prosecute. However, the police conduct their investigation into a case, it is ultimately the responsibility of the prosecutor to review the evidence against the defendant and determine whether to proceed. This requires *evaluating whether the available evidence is reliable and sufficient to prove the elements of a crime beyond a reasonable doubt* and whether bringing that prosecution is in the interests of justice.[68]

Moreover, the decision to prosecute "is not a one-time decision" but an "ongoing" one that the prosecutor "must reevaluate throughout the case as new information comes in."[69]

The District Court, in the first sentence of its opinion vacating Lopez's conviction, declared that the case against Lopez was "rotten from day one." [70] The court concluded that Leopold was not only "deceitful" but also "overzealous" in her prosecution of Lopez.[71]

Both the Appellate Division, on direct appeal, and the Kings County Supreme Court, hearing a CPL §440 motion, found that the evidence against Lopez was legally sufficient to uphold his conviction.[72] But the District Court had an opposite view of the sufficiency of trial evidence. In vacating Lopez's conviction, the District Court declared: "Even *without* the benefit of Lopez's new evidence, a reasonable juror would likely have serious questions about Lopez's guilt."[73] Criticizing the CPL §440 motion determination that the trial evidence was sufficient, the District Court stated:

> [The Kings County Supreme Court]'s opinion on Lopez's motion to vacate judgment states in a conclusory fashion that there was "strong evidence of guilt at [Lopez's] trial." This

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[64] *Id.* at 407.

[65] *Id.*

[66] *Id.* at 431.

[67] Kings County District Attorney, 426 Years Report: An Examination of 25 Wrongful Convictions in Brooklyn, New York, at 60 (July 9, 2020), https://tinyurl.com/552ejuem (hereafter "426 Years Report").

[68] *Id*. at 60 (emphasis added).

[69] *Id.* at 61.

[70] *Lopez*, 915 F Supp 2d at 381.

[71] *Id.* at 431.

[72] *Lopez*, 197 AD2d at 595; *Lopez*, 915 F Supp 2d at 412 n 25.

[73] *Lopez*, 915 F Supp 2d at 411.

> finding contains no explanation and is, frankly, outlandish given the circumstances described above. The court gives it no deference.[74]

Leopold, then, had decided to prosecute Lopez in a "rotten" "toss-up" case where the evidence was "weak[]" and where "serious questions" existed about Lopez's guilt.[75] Without any physical evidence tying Lopez to the crime, Leopold relied on two eyewitnesses. One of them, Flores, "was sober, face-to-face with the shooter, and spoke to him as he pointed a gun to her head."[76] Yet Flores did not recognize Lopez in the courtroom during the hearing, and she testified at trial to a description of the shooter that did not match Lopez.[77] Flores seems to have provided reliable, but completely insufficient, evidence; in fact, she seems to have provided evidence that supported the conclusion that Lopez was *not* the shooter.

The only eyewitness who seems to have identified Lopez was Chapman, who "was in the midst of a two-day crack binge on the night of the shooting and had smoked ten to twelve vials of crack in the preceding two hours."[78] Chapman "claimed to have seen everything while peeking through a partially ajar door in a different room, and provided inconsistent accounts of what she saw."[79] The circumstances of Chapman's identification of Lopez—arising from Chapman's arrest on an unrelated case[80]—should have put Leopold on high alert that her sole relevant eyewitness was unreliable. Chapman did not step forward independently to provide this information to the police, but instead provided it upon her arrest, when she had a motivation to provide useful information to get a favorable treatment.[81] Leopold later offered Chapman a deal: a time-served sentence on Chapman's probation violation in exchange for trial testimony consistent with Chapman's statement to the police about Lopez.[82]

It seems that Leopold should have been aware of the weakness of the evidence against Lopez and should have stopped prosecuting him at least when Flores did not recognize Lopez in the hearing, Flores's description of the shooter at trial did not match Lopez, or when Chapman testified inconsistently with her own statement to the police. At any of these points, Leopold could have stopped to investigate the case further or dismissed the case outright. That the weakness of the evidence was readily apparent to the District Court—22 years after the trial took place—emphasizes that Leopold should have been able to reach this same conclusion back then—before Lopez spent 23.5 in prison.

While the jury did find Leopold's evidence sufficient to prove the charges beyond a reasonable doubt, the District Court's opinion makes clear that Leopold was "overzealous" and, it seems apparent, should not have pursued a case on this flawed evidence. The Grievance Committee

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[74] *Id.* at 412 n 25 (citations omitted).

[75] *Id.* at 381, 411-412.

[76] *Id.* at 411.

[77] *Id.* at 411-12.

[78] *Id.* at 412.

[79] *Id.*

[80] *Id.* at 386.

[81] *Id.* at 387.

[82] *Id.*

should investigate whether Leopold's pursuit of the case against Lopez violated her ethical duties, as described below.

3. The Grievance Committee Must Seek Discipline for the Serious Professional Misconduct That Occurred Here.

As noted by one Grievance Committee, "[t]he legal profession expects all lawyers to conduct themselves in an honest and ethical manner in accordance with the Rules of Professional Conduct."[83] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[84] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[85]

Our laws and profession hold prosecutors to an even higher standard. Prosecutors wield immense power—the power to punish on behalf of the state. Such immense power, when left unchecked, can cause indelible harm. The United States Supreme Court has stated unequivocally that prosecutors "have a special duty to seek justice, not merely to convict."[86]

In handing ex-prosecutor Glenn Kurtzrock a two-year suspension for his past prosecutorial misconduct, the Appellate Division reminded us, "Prosecutors, in their role as advocates and public officers, are charged with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[87]

Therefore, a prosecutor is not merely an advocate for a victim, a complainant, or society as a whole. Instead, a prosecutor is a "minister of justice," responsible to guarantee "procedural justice and that guilt is decided upon the basis of sufficient evidence."[88] Similarly, the professional guidelines promulgated by the American Bar Association make clear that a prosecutor's job goes well beyond achieving the maximum number of convictions.[89] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[90] Indeed, as agents of the state and ministers of justice, prosecutors play a highly public role. Failing to acknowledge their misconduct, or hold them accountable for it, tarnishes the legitimacy of the criminal system, the bar as a whole, and the rule of law itself.

A. Leopold's Misconduct Violated the New York Code of Professional Responsibility.

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[83] Attorney Grievance Committee of the First Judicial Department, *How to File a Complaint*, https://tinyurl.com/39axvffr.

[84] Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.2(a).

[85] *How to File a Complaint*.

[86] *Connick v Thompson*, 563 US 51, 65-66 (2011) (quotation marks omitted).

[87] *Kurtzrock*, 192 AD3d 197, 219.

[88] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1].

[89] ABA Criminal Justice Standards: Prosecution Function Standard 3-1.2 ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

[90] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b).

The standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence—not a higher standard, such as clear and convincing or beyond a reasonable doubt.[91] As the Court of Appeals explained, "the privilege to practice law is not a personal or liberty interest, but is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required."[92]

Since Leopold's misconduct occurred in 1990, the now-repealed Code of Professional Responsibility ("Code") governed attorney professional conduct. Leopold made multiple violations of multiple Rules under the Code.

Leopold also made at least one false representation to the court. Under Rule 7-102, attorneys were not to knowingly make a false statement to the court or use evidence they knew to be false.[93] Rule DR 1-102 prohibited attorneys from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."[94] Leopold may have violated Rules 7-102 and 1-102 twice. Her first false representation, as the court found, was when she told the judge that Chapman was unaware of the prosecution's offer. But before that, Leopold initially told the trial judge that she had no knowledge of any agreement with Chapman, only to correct herself after Lopez's attorney referenced "contrary information" that he had learned from Leopold herself.[95] Such false and "deceitful"[96] representations negatively affect the function of the court and the criminal process.

Leopold's misconduct also prejudiced the legal process. Rule DR 1-102 prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, or engaging in any other conduct that adversely reflected on their fitness to practice law.[97] Such conduct includes an attorney's making misrepresentations during legal proceedings.[98]

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[91] *See, e.g.*, *Matter of Capoccia*, 59 NY2d 549, 551 (1983).

[92] *Matter of Seiffert,* 65 NY2d 278, 280 (1985) (quotation marks omitted); *see also Matter of Scudieri*, 174 AD3d 168, 173 (2019).

[93] Code of Professional Responsibility DR 7-102 (22 NYCRR 1200.33 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.3 of the Rules of Professional Conduct replaced it in 2009.

[94] Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 8.4(c) of the Rules of Professional Conduct replaced it in 2009. *See also Muscatello*, 87 AD3d at 158-59 (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rule 8.4(c)).

[95] *Lopez*, 915 F Supp 2d at 387.

[96] *Id.* at 431.

[97] Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced it in 2009.

[98] *In re Muscatello*, 87 AD3d 156, 158-59 (2d Dept 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rules 8.4(d), (h), the modern equivalents of DR 1-102).

Finally, the Committee should investigate Leopold's decision to prosecute Lopez. If the charges against Lopez were not supported by competent evidence demonstrating probable cause of his guilt, it was improper for Leopold to pursue the charges.[99]

B. For Her Misconduct, Leopold Must be Disciplined.

New York does not have a statute of limitation barring disciplinary action against an attorney—and rightfully so. As explained by the American Bar Association, "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice."[100] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[101]

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[102] Simply being a prosecutor supports aggravated discipline because the law tasks prosecutors "with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[103] Similarly, extensive prosecutorial experience weighs towards a more serious sanction.[104]

The Appellate Division has demonstrated that misconduct that affects the credibility of a prosecutor should not be taken lightly. It suspended a prosecutor for three years for misleading a trial court, and explained that, "such [mis]conduct strikes at the heart of [the prosecutor's] credibility as a prosecutor and an officer of the court."[105] In that same case, the Appellate Division demonstrated that a prosecutor's "ample opportunity" to correct or clarify the misrepresentation—and failure to do so—counts against him in evaluating proper disciplinary measures.[106]

Leopold received her bar license in New York State in 1986, which means that in 1990, when she committed the misconduct in this case, she was already an experienced attorney. Moreover, throughout the trial—and for *years* after—Leopold apparently did not correct or clarify her misrepresentation.

Leopold's violations of the Professional Rules had real-world, grave consequences. Lopez, who was 30 years old when he was incarcerated on these charges, was released from prison at the

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[99] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) ("A prosecutor … shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor … knows or it is obvious that the charge is not supported by probable cause."). The rule at the time of Leopold's misconduct mandated the same. Code of Professional Responsibility DR 7-103 (22 NYCRR 1200.34 (repealed)).

[100] ABA Model Rules for Lawyer Disciplinary Enforcement rule 32 (Commentary 2020).

[101] *Id.*

[102] *Kurtzrock*, 192 AD3d at 219; *see also Rain*, 162 AD3d at 1462 ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.").

[103] *Kurtzrock*, 192 AD3d at 219.

[104] *Id.*

[105] *See Stuart*, 22 AD3d at 133.

[106] *Id*.

age of 53, and died less than 2 years later.[107] Lopez spent almost half of his life in prison because Leopold "overzealous[ly]" pursued his charges with scant and unreliable evidence and while making false representations to the court.

We believe a grave sanction, such as a lengthy suspension or disbarment, is the appropriate discipline for the misconduct described in this grievance. As prosecutorial misconduct becomes increasingly identified as a stain on our legal system's promise of justice and fairness, some state courts have taken decisive action, disbarring prosecutors for egregious misconduct. While several states have disbarred prosecutors for on-the-job misconduct, including Texas, Minnesota, Pennsylvania, North Carolina, and Arizona, we have not found a single such occurrence in New York, despite the many criminal cases that pass through the state's large court system every year.

If disbarment is *never* applied as a sanction for prosecutorial misconduct—if it is *de facto* taken off the table—prosecutors can rest assured that, even if they are caught committing the most severe misconduct, they will face at most a short suspension of their law license. Career advancement by developing a reputation for winning cases at all costs is an obvious incentive for prosecutors to bend and break rules. If the Grievance Committee and courts do not apply an actual—rather than theoretical—disincentive, prosecutorial misconduct will continue unabated.

Conclusion

The District Court found that Leopold made a false representation to the court. The Grievance Committee should further investigate whether Leopold pursued charges against Lopez that lacked probable cause, on the basis of weak, unreliable evidence. As described above, Leopold violated the legal professional rules. To these writers' knowledge, Leopold remains unsanctioned publicly or privately for her serious misconduct. A serious sanction is appropriate for this serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[108] To that end, "the grievance process exists to protect the public . . . . By bringing a complaint to a committee's attention, the public helps the legal profession achieve its goal."[109] The judicial finding identified in this grievance provides far more evidence than necessary to meet the "fair preponderance of the evidence" standard to discipline the prosecutor at issue, but we call upon the Grievance Committee to go further and investigate far beyond the court finding identified in this grievance. For the legitimacy of and public trust in the criminal system, and the bar, the investigation should be public at every stage possible.

Below are some essential aspects of such an investigation:

1. The Committee should begin by investigating the many other cases prosecuted by Leopold. As the comment to Rule 8.3 of the New York Rules of Professional Conduct

[107] *See* Exhibit B, NYSCEF Doc No. 1, complaint and accompanying exhibits, in *Lopez v The State of New York*, Ct Cl, Bronx County, claim No. 125150 (Oct. 22 2014) (stating Lopez's date of birth, date of death, and date of release from prison).

[108] NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, https://tinyurl.com/47scv4pb.

[109] *Id.*

reminds us, "An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."[110] Using its power to investigate, including to issue subpoenas and interview witnesses, the Committee can and should obtain a list of all cases that this prosecutor worked on and contact the attorneys, witnesses, and accused persons (while protecting the accused's rights to privacy and counsel) in those cases. The Committee should also identify all of Leopold's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

This type of comprehensive investigation may seem onerous, but the recent investigation into former Suffolk County Assistant District Attorney Glenn Kurtzrock demonstrates both the viability and overwhelming necessity of a systematic investigation. In a 2017 murder trial, *People v. Booker*, Kurtzrock committed a wide range of egregious discovery violations, leading to his resignation and the Appellate Division's December 2020 ruling suspending his law license for two years.[111] In imposing this sanction, the Appellate Division highlighted as a mitigating factor that "there was no showing that [Kurtzrock] engaged in any similar conduct in any other cases."[112]

But at the time of the December 2020 Appellate Division ruling, there was in fact already significant evidence of similar misconduct by Kurtzrock in other cases, which would have been easily identified if a systematic investigation had been undertaken.[113] To start, after Kurtzrock's *Brady* violation was revealed during the 2017 *Booker* trial, defense counsel for a different murder case in which Kurtzrock had obtained a conviction, *People v. Lawrence*, then pending on appeal, requested a reexamination of the discovery in that case. The District Attorney's Office agreed, and the investigation revealed that Kurtzrock had failed to disclose more than 40 items of *Brady* and/or *Rosario* evidence in *Lawrence* as well, including a payment to a witness and exculpatory witness statements. Consequently, the judge dismissed the indictment in 2018, and Shawn Lawrence, who had served six years of incarceration of his 75-years-to-life sentence, was released.[114] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[115]

A systematic investigation of Kurtzrock ensued that uncovered even more suppressed evidence. Following the Appellate Division's December 2020 ruling, the Suffolk County District Attorney's Office ("SCDAO") worked with the New York Law School

[110] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

[111] *Kurtzrock*, 192 AD3d 197.

[112] *Id.* at 220.

[113] Letter to Second Department (unfiled), Nina Morrison of the Innocence Project and Paul Shechtman of Bracewell LLP, January 20, 2021; see also Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, https://tinyurl.com/52ar9tjx.

[114] Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, https://tinyurl.com/52ar9tjx.

[115] County of Suffolk Office of District Attorney, Review of the Disclosure Practices of Assistant District Attorney Glenn Kurtzrock, https://tinyurl.com/2a7ba9cd (hereafter "Kurtzrock report") at 11 (discussing case of *People v. Shawn Lawrence*) (internal quotation marks omitted).

Post-Conviction Innocence Clinic to conduct a comprehensive review of Kurtzrock's trial cases and other cases where Kurtzrock's actions raised discovery issues.[116] The investigation and resulting public report identified that numerous prosecutions by Kurtzrock were infected by "practices similar to those criticized by the Appellate Division in the [2017] *Booker* case,"[117] which the report characterized as a "potential systemic issue."[118]

As a result of the investigation, the SCDAO provided new evidence to defendants in **100 percent of Kurtzrock's homicide cases and 76 percent of all trial cases reviewed**. [119] These disclosures have already spurred applications to review convictions.[120] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[121] an important step given that, in explaining the lenient two-year suspension for Kurtzrock's misconduct in *Booker*, the Appellate Division cited the ostensible lack of evidence of misconduct by him in other cases.

The Kurtzrock investigation thus demonstrates the sound logic behind the comment to Rule 8.3 that "[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover"[122] and the need for the Grievance Committee to systematically investigate this prosecutor's work.

2. The Committee should promptly investigate whether any supervising attorney at the Kings County District Attorney's Office is also culpable for the ethics violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct, which provides direct culpability for supervising attorneys under various circumstances, including when a supervisor knowingly ratifies improper conduct or knows of the conduct when it could be prevented but fails to take remedial action.[123]

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[116] The SCDAO "attempted to identify and examine for *Brady/Giglio* and *Rosario* compliance all cases Kurtzrock tried while serving as an ADA with the SCDAO, both as a homicide prosecutor and while serving in a bureau that prosecutes non-fatal violent crimes and other felony offenses. The CIB also examined additional cases… that Kurtzrock did not try himself but in which Kurtzrock's actions prior to trial were identified as raising *Brady*/*Giglio* and/or *Rosario* compliance concerns." *Id.* at 4.

[117] *Id.* at 5.

[118] *Id.* at 4.

[119] *Id.* at 6.

[120] *Id.*

[121] *Id.* at 7.

[122] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

[123] Rules of Professional Conduct (22 NYCRR 1200.0) rule 5.1 (d) reads: A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

3. The Grievance Committee should investigate whether the Kings County District Attorney's Office and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole, and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.[124]

4. The Committee should identify any prosecutors trained and/or supervised by Leopold and determine whether instances of prosecutorial misconduct can also be found in their work as prosecutors.

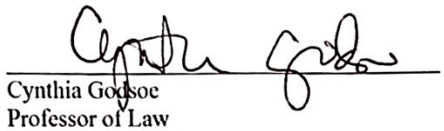
We recognize that bar discipline provides a uniquely individual remedy that will not, on its own, remedy the systemic problems identified above in this letter. For this reason, we also call for the implementation of an independent public commission empowered to systematically investigate all cases identified in #1-4 above and advise the court if this investigation casts doubt on the integrity of any convictions. To be clear, we do not mean a closed-door, cloaked process inside a District Attorney's Office, but rather a commission that operates transparently and includes members of the public, including members of impacted communities of color, public defenders and other criminal defense attorneys, civil rights attorneys, and people who have been incarcerated and their loved ones.

Thank you for your careful consideration of this matter.

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

[124] District Attorney offices qualify as "law firms" under Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0 (h). "'Firm' or 'law firm' includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization."



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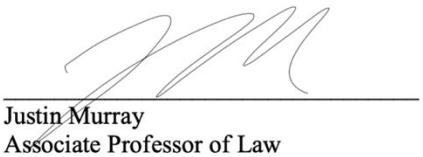

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